No. 66

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellants,

v.

J. B. MONTGOMERY, INC.,

Appellee.

On Appeal from the United States District Court for the District of Colorado

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BRIEF FOR THE APPELLEE J. B. MONTGOMERY, INC.

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STATUTES INVOLVED

Sections 5(b), 203(a)(14), 203(a)(15), 204(a)(1), 204(a)(6), 208(a), 209(b), and 212(c) of the Interstate Commerce Act, 49 U.S.C. §§ 5(b), 303(a)(14), 303(a)(15), 304(a)(1), 304(a)(6), 308(a), 309(b) and 312(c), and Section 7(c) of the Transportation Act of 1958, Stat. 573-574 are set forth in the Appendix, *infra*, pp. 39-42.

STATEMENT

The appellee submits that the following additional facts should be before the Court:

A consolidated hearing, Examiner's report and recommended order was served September 26, 1958, which included the proceeding in Docket No. MC-72273, *J. B. Montgomery, Inc., Modification of Permit.* (R. 13-35) The Examiner found that J. B. Montgomery, Inc.'s operations did not conform with the definition of a contract carrier and therefore it was recommended that a Certificate of Public Convenience and Necessity authorizing common carriage issue in lieu of the appellee's Permit. (R. 28) The authority recommended did not contain the restriction subsequently imposed by Division 1 of the Commission as the Hearing Examiner concluded that such a restriction would be incompatible with the appellee's duty as a common carrier. (R. 26, 31-32).

After the issuance of the report and order of the Commission, Division 1 (R. 36-52), the appellee filed a Petition for Reconsideration and by Order dated May 17, 1961, the Commission denied the petition. (R. 53-53). The appellee exhausted its administrative remedies.

The District Court in setting aside the Commission's Order and remanding the matter for further action by the Commission, specifically held that the Commission was without statutory authority to impose the restrictions in question. (R. 73).

SUMMARY OF ARGUMENT.

The appellee has not received a certificate authorizing it as a common carrier to carry the same commodities to the same points or within the same territory as authorized in its permit, because of the Commission's imposition of restrictions which limit service from, to, or between wholesale or retail outlets of a specified type. The failure of the appellee to receive such a certificate constitutes a violation of Section 212(c) of the Interstate Commerce Act.

Imposition of the restrictions would result in a substantial diminution of the appelle's commodity and territorial authority. The inability of the appellee to carry the same commodities between the same points or within the same territory precludes the appellee from providing the same service it could provide as a contract carrier. This diminution is substantial and real.

The restrictions could also have a prospective effect which the Commission ignored. A change in the marketing pattern of the commodities involved could substantially increase the severity of the Commission's action and cause additional harm to the appellee in derogation of the protection which Congress afforded it.

The Commission is without the statutory authority to impose the restrictions. Section 212(c) is clear and unambiguous on its face. The section is specific in assuring that the appellee, as a converted common carrier, would have the authority to carry the same commodities between the same points or within the same territory as authorized in its permit. No other meaning can be ascribed to it. The Commission is violating its administrative function by attempting to inject additional standards which would allow

it to restrict the appellee's authority in the manner attempted.

The appellants' injection of the legislative history and other sections of the Act in support of its position is not apropos since no ambiguity exists in the statutory language of Section 212(c). Furthermore, recourse to the legislative history or other sections of the Act does not sustain the imposition of the restrictions. On the contrary, it emphasizes that the Commission has transgressed its authority.

Section 212(c) was not intended to restrict the converted carrier's authority. On the contrary, a certain enlargement in the scope of operations of converted carriers was anticipated (R. 72). Assurance that a converted carrier's authority would not be diminished was also sought by the legislators. The Commission, through its spokesman, Chairman Clarke, gave such assurance. Mr. Clarke stated explicitly that nothing would be taken from the carriers. (R. 71). The Commission's action in this cause, however, is contrary to the position it took in advancing the legislation involved. Its action is therefore contrary to the predicate of the legislation as well as the specific statutory language enveloping the intent of Congress.

The juxtaposition and cross-referencing of the various sections of the Act in an attempt to seize upon some fragment of authority ignores the maxim *expressum facit cessare tacitum* (that which is expressed makes that which is implied to cease). Recourse to other sections of the Act cannot change the clear and ordinary meaning of Congress' commands. Section 212(c) is explicit in what can be done. Furthermore, the sections cited differ from section 212(c) in that they affirmatively give the Commission statutory authority to impose restrictions. In the

absence of such affirmative delegation in Section 212(c), the Commission has no authority to impose the restrictions and precedent precludes the Commission from engrafting its own standards.

Finally, it must be recognized that the imposition of the restrictions is inconsistent with the obligations imposed upon the appellee. Such restrictions are imposed in contract carrier permits to limit the essential character of the service to be rendered so as to prevent the contract carrier from serving the general public. The appellee, as a common carrier, however, is obligated to serve the general public. The Commission's imposition of the restriction is a departure from its own precedents and will result in the abrogation of the appellee's recognized rights, duties and obligations as a common carrier.

QUESTIONS PRESENTED

The following questions are presented by this action:

1. Does the Commission have the statutory power under Section 212(c) or any other applicable provisions of the Interstate Commerce Act to impose restrictions on the authorities of the converted carrier limiting the service authorized to movements from, to or between outlets or other facilities of particular classes of shippers?

2. Are such restrictions territorial limitations which do not permit the converted carrier to transport the same commodities between the same points or within the same territory as authorized in its Permit, contrary to the provisions of said Section 212(c) of the Act?

3. Are such restrictions contrary to the converted carrier's rights, duties, and obligations as a common carrier to perform service for the general public within the limits of its facilities on the commodities and between the points or within the territories authorized to be served by it?

ARGUMENT.

1. The Restrictions Imposed Are Contrary to the Specific Dictate of Congress.

Congress was specific in dictating the power it was granting the Commission under Section 212(c) of the Act, 49 U.S.C. 312(c). It is succinctly stated:

> "The Commission shall examine each outstanding permit and may within one hundred and eighty days after the date this subsection takes effect institute a proceeding either upon its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and hearing revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on the date this subsection takes effect do not conform with the definition of a contract carrier in section 203(a)(15) as in force on and after the date this subsection takes effect; second, are those of a common carrier; and, third, are otherwise lawful. *Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit.*" (Emphasis added.)

The language is clear and unambiguous on its face.

The appellants concede that the appellee is entitled to certification as a common carrier, (A. 12),* that the certificate must embody the same territorial and commodity authority as the prior permit (A. 12), and that the imposition of the restrictions would preclude the appellee from carrying the same commodities between the same points or within the same territory so authorized in the

*"A" references are to appellants' brief.

permit. (A. 24). In what appears to be a direct attempt to circumscribe the applicable legislation, appellants would impose the restrictions on the basis that the failure of the appellee to receive the full authority guaranteed it by Congress ". . . would be a small price to pay for the avoidance of the mischief which the grant of unlimited authority sought by Montgomery would create." (A. 24).

The above position of the appellants was rebuffed by the District Court which recognized that the Commission was attempting to inject its own standards. The District Court stated (R. 72):

> "Any adverse effect upon the industry resulting from the lack of authority of the Commission to impose restrictions to accomplish "substantial parity" between past and future operations is a matter for consideration by the Congress and is not a justification for this court to write into the congressional legislation something which is neither evident from the language of the Act nor from the legislative history."

This finding is constant with existing law as recognized in numerous cases before this honorable Court.

It is axiomatic that the Commission or any administrative body has the power to act only on the basis of specific statutory authority granted to it by Congress. In *Social Security Board* v. *Nierotko*, 327 U.S. 358 (1946), Mr. Justice Reed speaking for the Court, at p. 369, clearly set this forth:

> "Administrative determinations must have a basis in law and must be within the granted authority. Administration when it interprets a statute so as to make it apply to particular circumstances acts as a delegate to the legislative power. Congress might have declared that 'back pay' awards under the Labor Act

> should or should not be treated as wages. Congress might have delegated to the Social Security Board to determine what compensation paid by employers to employees should be treated as wages. Except as such interpretive power may be included in the agencies' administrative functions, Congress did neither. An agency may not finally decide the limits of its statutory power. That is a judicial function".

Similar cases wherein the same judicial opinion is espoused are legion. See, for example, *Colgate Palmolive-Peet Co.* v. *NLRB*, 338 U.S. 355 (1949) and *United States ex rel. Kansas City Southern Ry. Co.* v. *Interstate Commerce Commission*, 18 F. Supp. 94 (D.D.C. 1937).

In the instant cause, the Commission predicates its action on the basis that Section 212(c) is subject to construction and that its views as an administrative body are entitled to great weight (A 13). It is a well recognized principle that in the interpretation of a doubtful or ambiguous statute the long-continued and uniform practice of the authorities charged with its administration is entitled to great weight, and will not be disturbed except for cogent reasons. This principle, however, has no effect where there is no ambiguity in the statute. See, for example, *Louisville & Nashville Railroad Company et al.* v. *United States et al.*, 282 U.S. 740 (1931); *Norwegian Nitrogen Products Company* v. *United States*, 288 U.S. 294 (1933); and *United States et al.* v. *Missouri Pacific Railroad Company*, 278 U.S. 269 (1929).

Section 212(c) is clear and unambiguous on its face. The converted carrier is entitled to a certificate authorizing the transportation ". . . of the same commodities between the same points or within the same territory as authorized in the permit."

Recourse to the legislative history of Section 212(c) or other sections of the Act, and/or general transportation policies is not warranted. The dictate of Congress is precise and clear. The appellants' admission that these dictates have not been followed because of other considerations should foreclose their prayer for the relief requested from this Court. To allow the Commission to consider these other factors in the absence of an ambiguity would be tantamount to allowing it to deprive appellee of a substantial right guaranteed by affirmative enactment of Congress through the imposition of administrative legislation.

The Commission, while recognized as an able administrative agency, cannot resist legislative change and seek to conform all new legislation with past practices. The Commission's attempt to predicate its authority on the basis of other sections of the Act is an attempt to do so.

The appellants seek to depart from the clear language of Section 212(c) of the Act on the basis that the section was referred to by the Commission and several parties as a "grandfather" clause and that it has all of the attributes of the "grandfather clauses" of the Motor Carrier Act of 1935, Sections 206(a)(1) and 209(a)(1) of the Act, 49 U.S.C. 306(a)(1) and 309(b)(1), including the concept of "substantial parity" (A. 18-19). This argument was answered effectively in the decision of the District Court. Therein, it was pointed out that the power to impose territorial restrictions under the "grandfather" provisions is "derived from express delegation of power by Congress" and that "Section 212(c) neither authorizes the Commission to specify territory nor determine bona fides of prior operations", (R. 69-70).

Perusal of the applicable sections of Part II of the Act which deal with the grant of operating authority, i.e., Sections 206, 207, 208, and 209, 49 U.S.C. 306, 307, 308, and 309, and Section 7(c) of the Transportation Act of 1958, amending Section 203(b)(6), reveal that each of these sections contain either specific provisions giving the Commission the power to impose restrictions or conditions on the authorities granted, or refer to other sections of the Act granting that power. In fact, the provisions of Section 209(b) of the Act, 49 U.S.C. 309(b), as they were written prior to the 1957 amendment, were construed as giving the Commission the specific statutory power to impose "Keystone" restrictions in the authorities of contract motor carriers. The pertinent portion of said Section 209(b) of the Act, as it was then written, reads as follows:

> "... The Commission shall specify in the permit the *business of the contract carrier* covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, *such reasonable terms, conditions and limitations consistent with the character of the holder as a contract carrier* as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under section 304(a)(2) and (6) of this title". (Emphasis added)

The Commission in *Keystone Transp. Co. Contract Carrier Application*, 19 M.C.C. 475, construed the above language as giving it the right to impose "Keystone" restrictions with respect to the contract carrier authorities of both "grandfather" clause applicants and applicants for new authority. The Commission stated:

> "Here again there is no confusion of thought, but merely a *clear statement* of our *powers and duties* in connection with the granting of permits by either of the two methods above mentioned ('grandfather'

> operations and new operations) . . . it is clear that we have power to incorporate in a permit the territory or points to be served, the commodities to be transported, the equipment to be used, and any other specification necessary to describe the service authorized, *even to the extent of limiting the service to be rendered to that of a particular type—such as that rendered a retail food store*". (Emphasis added.)

In *Noble* v. *United States*, 319 U.S. 88 (1943) the Supreme Court affirmed the power of the Commission to impose a restriction limiting a contract carrier authority to service under contract with a particular class of shippers, and specifically found that the language of Section 209(b) of the Act was applicable to a "grandfather" clause applicant as well as to a new operator. The Court stated, at 92, footnote 4, as follows:

> "We do not accede to the suggestion that the permit specification clause in §209(b) is applicable only to new operators, not to 'grandfather' applicants. The Commission has consistently taken the view that it covers both. Re *Motor Convoy, Inc.*, 2 M.C.C. 197, 200; Re *Wray Wible*, 7 M.C.C. 165, 168; Re *Hunter*, 13 M.C.C. 109, 112, 113; Re *Marine Trucking Co.*, 17 M.C.C. 615. That interpretation is entitled to 'great weight'. *United States* v. *American Trucking Assos.*, 319 U.S. 534, 549, 84 L. ed. 1345, 1354, 60 S. Ct. 1059. It is consistent with the wording of §209. Paragraph (a) requires a contract carrier to have a 'permit' in order to issue the permit 'without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b)' within the prescribed time limitation."

It is clear from the above that the Commission relied upon specific statutory authority in imposing "Keystone" restrictions on contract carriers. This same type of specific statutory authority was carried forward, and strengthened,

in the 1957 amendment to Section 209(b) of the Act. As now in effect, Section 209(b) reads as follows:

> ". . . The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204(a)(2) and (6). . ."

Sections 206, 207 and 208 of the Act, 49 U.S.C. 306, 307, and 308, contain comparable provisions to Section 209 dealing with the grants of authority to common carriers and the issuance of Certificates of Public Convenience and Necessity. Section 208 deals specifically with the terms and conditions which can be imposed in said Certificates, and reads as follows:

> "Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions

as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204(a)(1) and (6)."

It is to be noted that the Commission, as in the case of contract carrier permits, is given the specific statutory authority to impose restrictions and conditions in the grants of Certificates to common carriers. This statutory authority is well recognized by the Commission and its powers thereunder have been approved by the Court. *U.S. v. Rock Island Motor Transit Company*, 340 U.S. 419 (1951). However, such statutory powers are limited to certificates "issued under sections 206 and 207". Section 206 contains the "grandfather" clause provisions of the Motor Carrier Act of 1935 and the 1950 amendment; and Section 207 relates to applications for new authority. There is nothing in Section 208 which would infer that it applied to any other sections of the Act, such as Section 212(c); and as indicated Section 212(c) does not make reference to Section 208 or to Certificates to be issued under Section 206 or 207.

In contrast to the lack of any statutory inference that Congress intended to give the Commission the power to impose restrictions or limitations on Certificates granted under Section 212(c), the Court's attention is directed to the "grandfather" clauses added to the Interstate Commerce Act since the original Motor Carrier Act of 1935. These are: Sections 206(a)(3) and 209(a)(3) of the Act; 49 U.S.C. 306(a)(3) and 309(a)(3) added in 1950, and Section 7(c) of the Transportation Act of 1958 amending Section 203(b)(6) of the Act.

Section 208 and 209(b), respectively, apply to the first two subsections described above, and give the Commission the same statutory power to impose restrictions and

limitations in the authorities granted as were applicable to the original "grandfather" clause applications under the Motor Carrier Act of 1935. The "grandfather" clause of the Transportation Act of 1958 contains provisions similar in effect to the "grandfather" clauses of the Motor Carrier Act of 1935 and relate such applications to Section 206(b) and 209(b), respectively. Paragraph (b) of said Section 7 of the Transportation Act of 1958 reads in part as follows:

> ". . . the Interstate Commerce Commission shall without further proceeding issue a Certificate or permit, as the type of operation may warrant, authorizing such operations as a common or contract carrier by motor vehicle if *application is made to said Commission as provided in Part II of the Interstate Commerce Act* and within one hundred and twenty days after the date on which this section takes effect." (Emphasis added)

There is nothing in the language of Section 212(c) of the Act which would indicate that an application was to be filed "as provided in Part II of the Interstate Commerce Act" (which we fairly infer as applying to Section 206(b)), nor that either Sections 206 or 208 were applicable to certificates authorized to be granted under Section 212(c). In fact, following the enactment of Section 212(c), the Commission amended its regulations dealing with application forms 49 CFR 168, to provide for a separate form for applications filed under the provisions of Section 212(c). 49 CFR 168.2, amended September 10, 1957, 22 F.R. 7529. Thus, in all respects Section 212(c) is considered as a separate and distinct type of authority which cannot be related to any other pertinent sections of the Interstate Commerce Act.

The Court's attention is also directed to the fact that in Section 5(b) of the Act, 49 U.S.C. 5(b), dealing with the

combination and consolidation of carriers, including motor carriers, the Commission is given the statutory authority to approve proposed finance transactions found to be consistent with the public interest "subject to such terms and conditions and such modifications as it shall find to be just and reasonable".

Section 212(c) also differs significantly from the "grandfather" clauses of the Act in theory. The Commission recognized this in *T.T. Brooks Trucking Co., Inc., Conversion Application*, 81 M.C.C. 561 (1959). At pages 570-571 of the report in that case, it is stated:

> "While we are satisfied that what section 212(c) provides is essentially 'grandfather' legislation with reference to operating authorities (and what may for convenience be termed a 'grandfather' clause), such 'grandfather' clause, as indicated above, differs from the 'grandfather' clauses contained in the Motor Carrier Act, 1935, in that the latter required proof by competent evidence of past and continuous bona fide 'operations' as the basis for the issuance of certificates and permits authorizing their continuance in the 'grandfather' clauses that the 'substantial parity' test referred to by many of the parties first arose. Thus, in reviewing our determination of an early application proceeding arising under the 'grandfather' provisions of section 206 of the Act, the Supreme Court stated that the purpose of that 'grandfather' clause was to assure those to whom Congress had extended its benefits a 'substantial parity between future operations and prior bona fide operations'. *Alton R. Co.* v. *United States*, 315 U.S. 15, 22. A short time later that Court indicated that we also had the power to impose in 'grandfather' certificates appropriate restrictions to insure that substantial parity between past and future operations is maintained. *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475. It may be noted too that in past determinations of such

'grandfather' rights, the precise pattern for future operations has been characterized as the product of this Commission's own expert judgment based on evidence as to prior operations, characteristics of the type of carrier involved, and the capacity or ability of the carrier to render service, *Howard Hall Co., Inc.* v. *United States*, 315 U.S. 495; and that restrictions compatible with a carrier's operations have been imposed under certain circumstances, *Crescent Exp. Lines, Inc.*, v. *United States*, 320 U.S. 401.

"In view of the utilization of the substantial parity test in the past, and in the absence of any congressional expression to the contrary, we are constrained to hold here that the so-called 'grandfather' clause contained in Section 212(c) should be administered on the basis of a 'substantial parity' test with respect to the conversion of *operation authorities* involved therein."

The contradictory elements in this discussion are apparent, and virtually defy comprehension. First, the Commission says that Section 212(c) is a "grandfather" clause, but is not a "grandfather" clause in the same sense as that originally employed in the Motor Carrier Act of 1935. Second, the Commission says, in effect, that the two can nevertheless be equated by ignoring their language and using as a common denominator, the "substantial parity" test developed in connection with the original "grandfather" clause. As a further contradiction, the Commission states, at a later point in the decision, that Section 212(c) "differs from other 'grandfather' provisions of the statute in that it contains no requirement that the converted carrier prove past bona fide operations, and that it has for its basis not the actual operations performed by the carrier but those authorized by its permits." We are reminded of Mr. Justice Jackson's comment in his dissenting opinion in the second decision in *Securities and*

Exchange Commission v. *Chenery Corporation*, 322 U.S. 194 (1947):

> "I give up. Now I realize fully what Mark Twain meant when he said: "The more you explain it, the more I don't understand it'."

"Grandfather" rights under the Motor Carrier Act of 1935 and the Transportation Act of 1958, are predicated on proof of bona fide operations, i.e., actual operations of a substantial nature. *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 480 (1942). Section 212(c) however, does not refer to "bona fide operations", 'substantial parity' or any similar abstract conceptions. The statute clearly states the conditions under which a certificate will issue. The appellee's operations under its permit are not significant. It is the authority which is significant. Congress specifically stated that the authority held in a converted carrier should be changed in a specific manner and in no way indicated that the Commission should go beyond its dictates to determine the practical effects which the change of the authority would have if compared with the appellee's past operations. If it had desired the Commission to do so, it could have used statutory language similar to that in the "grandfather" clauses and specifically delegated such authority to the Commission.

The appellants argue that specific authority is not needed because "Congressional silence on the issue seems to indicate a continuation of the administrative and judicial interpretation of [the earlier statutes]." (A. 29). Appellee submits, however, that Congress was not silent on the subject. Congress stated specifically that the appellee be authorized to carry the same commodities between the same points or within the same territory as authorized in the

permit. Any administrative action which would interfere with the appellee's enjoyment of this right is precluded. Contrary to the assertion of the appellants, the Congress did not have to include a provision specifically limiting the Commission's authority. The District Court recognized this when it stated (R. 71):

> This [last sentence of Section 212(c)] is tantamount to saying that the Commission shall not impose territorial restrictions beyond those contained in the permit.

To take a contrary position entirely overlooks the fact that administrative powers may be limited by affirmative dictates as well as by negative ones. Congress can state that a thing be done in a particular mode and this includes a negation of every other mode. See, for example, *Botany Worsted Mills* v. *United States*, 278 U.S. 282 (1929).

"Substantial parity" is therefore not constant with the dictates of Section 212(c). The language of that section affirmatively sets forth the standards governing conversions from contract to common carriage, and the Commission had no authority to deviate from such standards even though it may have disagreed with the wisdom of the legislators. If Congress had felt that the expertiseness of the Commission was needed in applying the statute to fit individual situations, Congress would have specifically provided the Commission with the necessary authority to achieve that goal. Congress has specifically done so in other sections of the Act; its abstention in Section 212(c), and its use of affirmative dictates to proceed in a specific way in that section, can only lead to the reasonable conclusion that the Commission has exceeded its statutory authority by reading into the Section a power which does not exist.

2. The Legislative History of Section 212(c) Precludes the Imposition of the Restrictions.

Appellee maintains, as previously indicated, that the clear and unambiguous language of Section 212(c) of the Act precludes any consideration of legislative history or other factors purportedly bearing on the construction of Section 212(c). Appellants, on the other hand, claim that such recourse is proper as Congress may have intended to give the Commission certain powers not specifically expressed in Section 212(c).

To the extent that resort to the legislative history is appropriate, appellee submits that the history supports the position that Congress did not intend to give the Commission the power to impose territorial or commodity restrictions beyond those contained in the permit of the converted carrier. In fact, the legislative history makes it abundantly clear that Congress did not intend to take *anything* away from the converted carrier. The District Court recognized this and further concluded that nothing in the legislative history cited by the Commission indicated a contrary intent (R. 71).

The specific proposal of the Commission as set forth on pages 162-163 of its 70th Annual Report, November 1, 1956, reads as follows:

> "6. (a) We recommend (1) that the definition of contract carrier by motor vehicle as set forth in Section 203(a)(15) be amended so as to state clearly the nature of the services which may be performed by such carriers and to provide that such services may be performed under continuing contracts for only one person or a limited number of persons, and (2), if so amended, that section 212 be amended by adding a new paragraph (c) authorizing the Commission to revoke the permit of such a carrier and to issue in lieu thereof

> a certificate of public convenience and necessity if it finds, after a hearing, that the operations of the permit holder are not those of a contract carrier under the revised definition, are those of a common carrier, and are otherwise lawful."

The proposal was silent in respect to the need for the imposition of the restrictions here involved, or the intent on the part of the Commission to have Congress give it the power to impose them.

When Mr. Clarke, then Chairman of the Commission, was being questioned about the proposal in the subsequent Senate Subcommittee hearings, again no mention of such restrictions was made. See *Surface Transportation—Scope of Authority of Interstate Commerce Commission, Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate*, 85th Cong., 1st Sess., hereinafter referred to as *Hearings*.

Rather than state or even infer that such restrictions might or would be imposed of necessity, the Commission through its spokesman, Chairman Clarke, specifically stated that Section 212(c) was not intended to reduce the scope of the authority granted a converted carrier, but, rather, to give the carrier greater opportunity.

In a colloquy occurring between Mr. Barton, transportation counsel of the Senate Interstate and Foreign Commerce Committee, and Chairman Clarke, the following pertinent question and response, as set forth in the District Court's opinion (R. 71), appears:

> "Mr. Barton: Mr. Clarke, do you think there is any constitutional difficulty in changing, as we say, as you propose, a contract carrier to a common-carrier status?
>
> Mr. Clarke: No, I can see none. *It isn't taking away from them anything that they have;* it isn't disturbing any property rights of the contract carrier.

> *It is giving him greater opportunity.* He can still serve his contract shippers, but through the conversion provisions of the bill, *he would also have the opportunity to serve the general public as well as the obligation.*" (Emphasis added). (P. 35 Hearings—Surface Transportation—Scope of Authority of Interstate Commerce Commission, 85th Cong. 1st Session.)

The Commission recognized that as a common carrier there would be an implicit appreciation in the carrier's ability to provide service, without limiting in any way the operations which they could previously perform as a contract carrier. The Commission did not state at that time or any other time during the Hearings that the converted carrier would be in substantial parity with its contract carrier status. The carrier would have "greater opportunity" and "could serve the general public as well as the obligation". The converted carrier could provide the same service to the existing clients as well as to the general public. The appellee would be precluded from doing so by the imposition of the restrictions.

The attention of the Senate was subsequently focused on "Keystone" restrictions as indicated by the following excerpt from the *Hearings*, at page 182:

> "Mr. Oren: They can haul for everyone. They can haul between the territories that they serve. They surely are not limited in any way as to what they can do and what they cannot do.
>
> Senator Purtell: You are speaking of the common carriers?
>
> Mr. Oren: I am speaking of the common carriers. Now, the contract carrier, on the other hand, must have a contract. It is limited as to its commodities. It is limited as to its territories. It is limited as to shippers. It is limited in many, many ways and the common carrier has no limitation whatsoever. They may haul general commodities; they may haul to or

from. They can haul everything practically that a contract carrier can haul, and I can't see how they can figure that—

Senator Purtell: Well, is it limited as to the number of shippers?

Mr. Oren: The common carrier is not.

Senator Purtell: I am talking about the contract carrier.

Mr. Oren: It never has been according to law, according to the way they granted us authority originally. There is no limitation in that respect.

Senator Purtell: I thought you stated you had that limitation.

Mr. Oren: Limitation as to shippers, but not the number.

Senator Purtell: *Character,* but not number."

(Emphasis added.)

Since Congress was aware of such restrictions, it would have been a simple matter to authorize their imposition. Congress has affirmatively done so in other sections of the Act. Instead, Congress adopted clear and unambiguous language which directed the Commission to act in a set manner. The Commission is under an obligation to act in that manner. It did not do so. The imposition of the restrictions, as conceded by the appellants (A. 24), would preclude the appellee from performing the same operations as it could under its old permit. This is contrary to the dictates and intent of Congress.

3. The Considered Restrictions Serve as Territorial Limitations Which Do Not Permit the Transportation of the Same Commodities Between the Same Points or Within the Same Territory as Contained in the Permit.

The Commission's contentions in *T. T. Brooks Trucking Co., Inc., Conversion Application,* 81 M.C.C. 561, and in the administrative report herein, that nothing commodity-

wise or territorially would be taken away from the converted carriers is not constant with the facts.

As a contract carrier, the appellee could transport any commodities dealt in by one of the class of shippers included under its "Keystone" restriction from, to or between any points in its authorized territory irrespective of the particular type of facility or business outlet from or to which the shipment was moving. Thus, if a wholesale department store, for example, desired appellee to transport a shipment directly from one of its suppliers to a customer, appellee was authorized to transport such a shipment under its contract with the wholesale department store. In the same manner, if a retail store desired appellee to perform a distribution service from a public warehouse to a number of customers, appellee was in a position to offer such a service. As a common carrier, however, it could not offer either of these services, since its authority is restricted to shipments moving physically from, to or between wholesale or retail department stores. The other restrictions have a similar effect. They limit the territory which can be served to particular types of business facilities or outlets. Thus, while purporting to grant authority to transport the same commodities and the same territory, the restrictions take away the right to serve all of the points in the territory, and accordingly limit the authority not only territorially but commoditywise.

Other specific examples illustrating the manner in which the converted authority of the appellee was diminished territorially and commoditywise by the restrictions emphasize the seriousness of the appellee's plight and the extensiveness of the loss it will suffer.

Appellee as a contract carrier was authorized to transport "Such commodities as are usually dealt in, or used

by, wholesale and retail department stores'' between Chicago and Denver, on the one hand, and on the other, a described portion of Illinois and Colorado, and all points in Kansas, Iowa and Nebraska. Its ''Keystone'' restriction permitted contracts with persons ''who operate wholesale and retail department stores, the business of which is the sale of general merchandise''. Under this authority, it could perform the following illustrative movements:

1. From a supplier to a consumer.
2. From a public warehouse to a customer.
3. From a supplier to a public warehouse.
4. From one public warehouse to another public warehouse.
5. From a supplier or public warehouse to a consolidation or transfer point.
6. From a supplier to a labeler or other person who performs work on a product on behalf of a department store.

None of the above movements could be handled by appellee as a common carrier, despite the fact that the shipments were being transported upon behalf of a department store. The converted authority is specifically restricted ''to shipments moving from, to or between wholesale or retail department stores''; and none of the business outlets described in the examples would so qualify. Thus, in effect, the authority of appellee is sharply cut from a broad territorial grant of authority to service from and to particular department stores within that territory. In the same manner, if the origins and destinations do not qualify as shipping points because of the above restrictions, appellee is deprived of the right to transport

the commodities which it is authorized to transport moving between those points. This further serves as a commodity limitation.

Appellee as a contract carrier was also authorized to transport "Such commodities as are usually dealt in, or used by, meat, fruit and vegetable packinghouses", between the same territory covered by the department store authority, under contract with persons "who operate wholesale or retail establishments, the business of which is the sale of meat, fruit and vegetable packinghouse products". Under this authority, appellee served under contract with meat packinghouses, canners and distributors of frozen foods. Set forth below are illustrative examples of the type of transportation which appellee was authorized to perform as a contract carrier:

1. Canned goods from a public warehouse to another public warehouse, an institution such as a hospital, school, county farm, etc., or to governmental installations, such as an Army camp or the Air Force Academy.
2. Frozen foods from a public cold storage warehouse to another cold storage warehouse or to the other types of receivers described in 1 above.
3. Vegetable oil or butter (both commodities dealt in by meat packinghouses) from a supplier (who is not a meat packer) directly to a customer of a meat packer, such as a bakery or other food processor.
4. Supplies, such as sugar, salt or glass bottles, used by a vegetable packinghouse, which are stored at outside warehouses, and the movement is from the supplier to such location.
5. Similar type supplies to those described in 4 above which cannot be fully used and are resold, and move either from the supplier to a consignee not

engaged in the sale of meat, fruit and vegetable packinghouse products, or from a warehouse to such type of consignee.

6. Any import shipments of meats which move from a ship dock to a warehouse, institution or transfer point, or are stored in a warehouse near the dock and are later shipped to locations described above.

7. Import shipments of hides, for example, from a ship dock to a tannery.

8. Export shipments, such as of frozen meats, sausage casings, etc., from a warehouse to a ship dock.

Under appellee's converted authority, restricted as it is to "shipments moving from, to or between wholesale and retail outlets, the business of which is the sale of meats, fruits and vegetable packinghouse products", it would not be authorized to perform any of the above indicated transportation. The consequences of such restrictions are substantial as in the case of the department store authority, since it in effect changes the authority from a broad territorial grant to service from, to and between particular outlets selling meat, fruit and vegetable packinghouse products. The Court is well aware that the interstate transportation of meats and packinghouse products can be performed only from federally inspected meat packinghouses. Therefore, since public warehouses, ship docks, etc. are not included within the language of the restriction, appellee's authority to transport meats and packinghouse products is virtually limited to transportation from, to or between these federally inspected packinghouses. As indicated above, it would not be in a position to transport these same commodities between public warehouses or cold storage houses used by such companies, nor would it be in a position to participate in any movements of imported or

exported packinghouse products moving between a ship and a facility that was not within the category of "wholesale and retail outlets, the business of which is the sale of meat". The same type of restrictions would apply in the case of the transportation of fruit and vegetable packinghouse products such as canned goods, various frozen foods and other similar commodities dealt in by fruit and vegetable packinghouses. It is impossible to measure the future impact of this type of restrictions, since Montgomery could be prevented in the future from transporting any commodity which it is authorized to transport, simply because it does not move from, to or between the particular type of business outlets described in the restriction.

The third authority held by appellee which was subject to a "Keystone" restriction permitted it to transport "such commodities as are usually dealt in by wholesale or retail hardware and automobile-accessory business houses, and in connection therewith, equipment, materials and supplies used in the conduct of such businesses" from Chicago, Ill. to certain named Colorado and Nebraska points, under contract with persons "who operate wholesale or retail hardware or automobile-accessory establishments, the business of which is the sale of hardware and automobile accessories". Under this authority, it could perform all the movements illustrated above with respect to the department store authority; and in addition, it could perform the following movements:

1. From a public warehouse (used by a hardware wholesaler for example) to a retail store not qualifying as a retail "hardware establishment", such as a discount house or garden supply store
2. From a supplier (of a hardware wholesaler) to the same type of retail stores

3. From a supplier (of a wholesale distributor of automobile-accessories) to a retail outlet not qualifying as an "automobile accessory establishment"

4. From a public warehouse (used by a wholesale distributor of automobile accessories) to the same type of retail outlets

5. From a supplier or public warehouse (used by a wholesale distributor of automobile accessories) to a major oil company for distribution to gas stations.

None of the above movements would be performed by appellee as a common carrier. The authority is now restricted "to shipments moving from, to, or between wholesale and retail outlets of hardware or automobile accessory establishments". The practical effect of the restriction could be to prevent service under the converted authority to some of the smaller towns included as destinations in the particular grant of authority. If the town lacks a store which was characterized specifically as a hardware or automobile accessory establishment, appellee would be prevented from serving the town on any movements from a supplier, public warehouse or other type of business establishment not falling specifically within the restriction. To all of the cities and towns named in the authority, the converted authority restricts the service specifically to or from hardware or automobile accessory establishments.

The restrictions also preclude the appellee from carrying the same commodities it could under its permit. For example, if the restrictions are imposed, the appellee would be unable to make pick-ups at a supplier of a department store and deliver it to a customer's office or house. It is common knowledge, however, that many items such as

furniture, major appliances, and farm supplies which are dealt in by department stores move direct to the purchaser from the supplier.

The certificate the Commission would issue the appellee ostensibly permits the transportation of all commodities dealt in by meat, fruit and vegetable packinghouses. Under its permit, the carrier could carry non-exempt vegetables for a wholesaler selling to an institutional user. The imposition of the restrictions in the certificate to be issued the appellee could preclude it from carrying non-exempt vegetables if they were shipped direct from the farmer to the institutional user. Yet, this is a common marketing pattern.

It can therefore be seen that in multiple respects the action of the Commission violates the prescription against a diminution of "commodity" rights as well as "territorial" rights.

The appellants speak of these limitations as being "isolated" examples (A. 24). This is not true and the appellants have no basis for making that characterization. The restrictions result in a substantial diminution of the appellee's rights. The above cited examples are limited to the more obvious situations; the examples are not exhaustive.

It should also be recognized that the Commission's unlawful imposition of the restrictions could have a serious effect on the appellee's future operations; this is a consideration entirely ignored under the "substantial parity" philosophy. A permit or certificate authorizes a carrier to provide service until revoked pursuant to statutory authority. Thus, at some future time the so alleged "isolated" examples of operations which appellee would be precluded from preforming as a common carrier could become

an important, if not critical, aspect of the appellee's operations. If a shipper's method of distribution changes in the future, it is imperative that the appellee be able to compensate for the change. A restriction would preclude it from doing so in many instances.

Although the appellants care to characterize the appellees' loss as a "small price to pay for the avoidance of the mischief which the grant of unlimited authority . . . would create," (A. 24),* appellee submits that any diminution of its territorial rights would be contrary to the provision of Section 212(c) and of substantial harm to the appellee. The loss to the appellee real and substantial.

If the restrictions are imposed, the appellee would also be faced with the ironical situation of being converted without receiving the substantial benefits which were to accrue under Section 212(c) (A. 24). As a contract carrier, the appellee had the right to contract with entities of the type specified in its permit and to aggressively seek new business within the scope of its authority. *U.S.* v. *Contract Steel Carriers,* 350 U.S. 409 (1956). Allegedly it can now haul for the general public. As a practical matter, however, this is of little consequence because of the restrictions. The service permitted under a restricted certificate would not be responsive to the needs of any segment of

* On what basis the appellants characterize the appellee's loss as a "small" one or make the value judgment expressed herein remains a mystery. Evidence of appellee's past operations is not of record as such operations are not relevant or material (R. 73). Therefore, the appellants have no factual basis for weighing the injury to be suffered by the appellee against the competitive effects on existing carriers even if the Commission had the statutory authority to do so.

the public which the appellee could not serve as a contract carrier. To restrict movements from, to, or between certain wholesale or retail outlets, in fact, restricts service to that performed on behalf of persons operating those wholesale or retail outlets. Thus, the ability to serve the general public is a fantasy. On the other hand, the converted authority would be decimated to the point where the appellee could not provide as complete a service for the shippers as it could and did prior to conversion. The examples which were cited conclusively establish that the loss was real and substantial. The appellants offer an illusion as compensation for that loss.

Furthermore, the Commission does not have the authority to modify the dictates of Congress because of its concern over the results flowing from the application of Section 212(c). It is a function of Congress to weigh the equities prior to legislating and it must be assumed that our legislators were cognizant of the results which would occur through the conversion procedure. The fact that Congress may have erred or acted in a manner inconsistent with the views of the Commission is of no consequence. The legislative change the Commission is attempting to inject by the imposition of the restriction must flow, if at all, from amendatory legislation rather than administrative legislation. See *United States* v. *Cooper Corporation et al*, 312 U.S. 600 (1941) and *Watson* v. *Buck*, 313 U.S. 387 (1941).

4. "Keystone" Type Restrictions Are Inconsistent With the Obligations Of a Common Carrier.

The Commission has held in many proceedings that it could not, consistent with the applicant's common carrier status, restrict its service to particular shippers. See, for example, *Barnett Trucking Co., Common Carrier Applica-*

tion, 41 M.C.C. 303; *Globe Cartage Co., Inc., Common Carrier Application*, 41 M.C.C. 313; and *Kickert Common Carrier Application*, 51 M.C.C. 1. In the instant situation, however, the Commission seemingly does not have trouble imposing such a restriction even though the appellee is to be certificated as a common carrier and is under an obligation to serve the general public.

The appellants attempt to justify the imposition of the restrictions by comparing the instant situation with analagous situations involving the "intended use" test (A. 32) and "plant-site" restrictions (A. 35). The appellee fails to appreciate the significance of these analogies.

Neither analogy is applicable since they involve restrictions imposed at the time the authority is granted. Therefore, no question of the Commission's "taking" a right from a carrier existed.* In the instant cause, this is not true. A substantial property right is being taken. To avoid constitutional implications, a grave overriding public interest would have to exist to necessitate such a "taking." If an interest of this nature existed, Congress would have provided for restrictions of the type imposed by positive, unmistakable statutory language or imposed tests by which such fact could be ascertained. It did neither. The conversion was to be in the words of Senator Lucas "almost automatic" (Hearings 143). The converted carrier need not enter evidence of its past operations, and in the ab-

* This is also true in respect to the imposition of a tacking restriction. Since contract carriers could not "tack", a tacking restriction imposed in a conversion proceeding is not "taking" anything from the carrier in derogation of Section 212(c). For this reason, the decision in *Tar Asphalt Trucking Co.* v. *United States*, 208 F. Supp. 611 (D.N.J. 1962), affirmed per curiam 372 U.S. 596 (1963) is not applicable and, as noted in the appellants' brief, the restriction is not contrary to the literal wording of the statute (A. 20).

sence of protests, evidence of the competitive situation would not be of record. Therefore, the Commission would not have any basis for making the determination of public interest. Congress knew this. It did not feel that such a determination need be made nor did it provide for it. The positive language it used in Section 212(c) evidences this.

Furthermore, the restriction flowing from the "intended use" test is not one concerning who the carrier can serve, but rather what commodities the carrier can carry. The pertinent portion of the definition of "common carrier by motor vehicle" as set forth in the Act, 49 U.S.C. 303(a)-(14), is as follows:

> The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property *or any class or classes thereof* for compensation, whether over regular or irregular routes. . . (emphasis added).

It is provided within the definition that a common carrier may be limited as to the property or commodities which it might carry, but no such provision is made for the imposition of a restriction as to the persons it may serve.

It is recognized that in many instances a commodity restriction will in effect restrict the number of persons who the carrier serves. This restriction flows from the nature of the commodity; the certificate still affords the carrier the right to serve any person desiring to utilize its service consistent with the commodity authorization. The restriction which the appellants would impose upon the appellee would not allow the appellee to serve all shippers who desire to ship the commodities authorized to be carried. The appellee could not provide the service unless the lading

move from, to or between specified wholesale or retail outlets.

The use of an analogy based on a plant site is not apropos. Although the appellants contend that such restrictions are not "unusual" (A. 35), it should be recognized that they are an exception to the rule and are not normally imposed. See *M.I. Boyle & Son, Inc. Extension—Fluorspar*, MC 106965 (Sub No. 144), 15 CCH Fed. Car. Cases Par. 35,341. It should also be recognized that the basis for imposing such a restriction is not applicable herein.

The Commission, by the use of a plant site restriction, attempts to conform the service authorized with the need shown and to protect existing carriers from competition not warranted by facts of record. This is accomplished by limiting the applicants' service to a specific territory, *i.e.* the plant site of the consignor or consignee. Thus, the restriction is not one dealing with the persons who can be served, but rather one which deals with the territory which can be served. The carrier can serve any member of the general public in the carriage of the authorized commodities so long as the shipment originates or terminates at the specific plant site.

The proceedings in which plant site restrictions are imposed involve applications under Section 206 of the Act, 49 U.S.C. 306. Section 208, 49 U.S.C. 308, deals with the terms and conditions which can be imposed in certificates issued pursuant to Section 206. It reads as follows:

> "Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not within which, the motor carrier is authorized to operate; and there shall,

at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204(a)(1) and (6)."

Perusal of the above section shows that the Commission has the specific authority to impose territorial restrictions. In the instant case such restrictions are contrary to the specific dictates of Congress that assure the converted carrier authority to serve the same commodities between the same points or within the same territory.

The Commission's approach in the matter also fails to appreciate the fact that the very reasons which justify the imposition of "Keystone" restrictions in contract carriers make them inappropriate in common carrier certificates.

The Court in *Noble* v. *United States*, 319 U.S. 88 (1943), recognized that "Keystone" restrictions were needed in a contract carrier permit to prevent the carrier from making a basic alteration in the characteristics of the enterprise, which ". . . would be a conversion for all practical purposes . . . into a common carrier, a step which would tend to nullify a distinction which Congress has preserved throughout the Act." 319 U.S. 91-92. By contrast, the issuance of a certificate as a common carrier, contemplates service to the public generally, and the imposition of a "Keystone" type of restriction in a certificate is contrary to the obligations and duties of a common carrier, both at

common law and under the Interstate Commerce Act. The Commission obviously knows this to be true, as indicated by the decisions cited above

The restriction placed in appellee's certificate is not authorized by the statute, and is inconsistent with the entire concept of common carriage. In imposing the restriction, the Commission has not only departed from its own precedents, but has exceeded its authority by attempting to abrogate the recognized rights, duties, and obligations of a common carrier.

CONCLUSION.

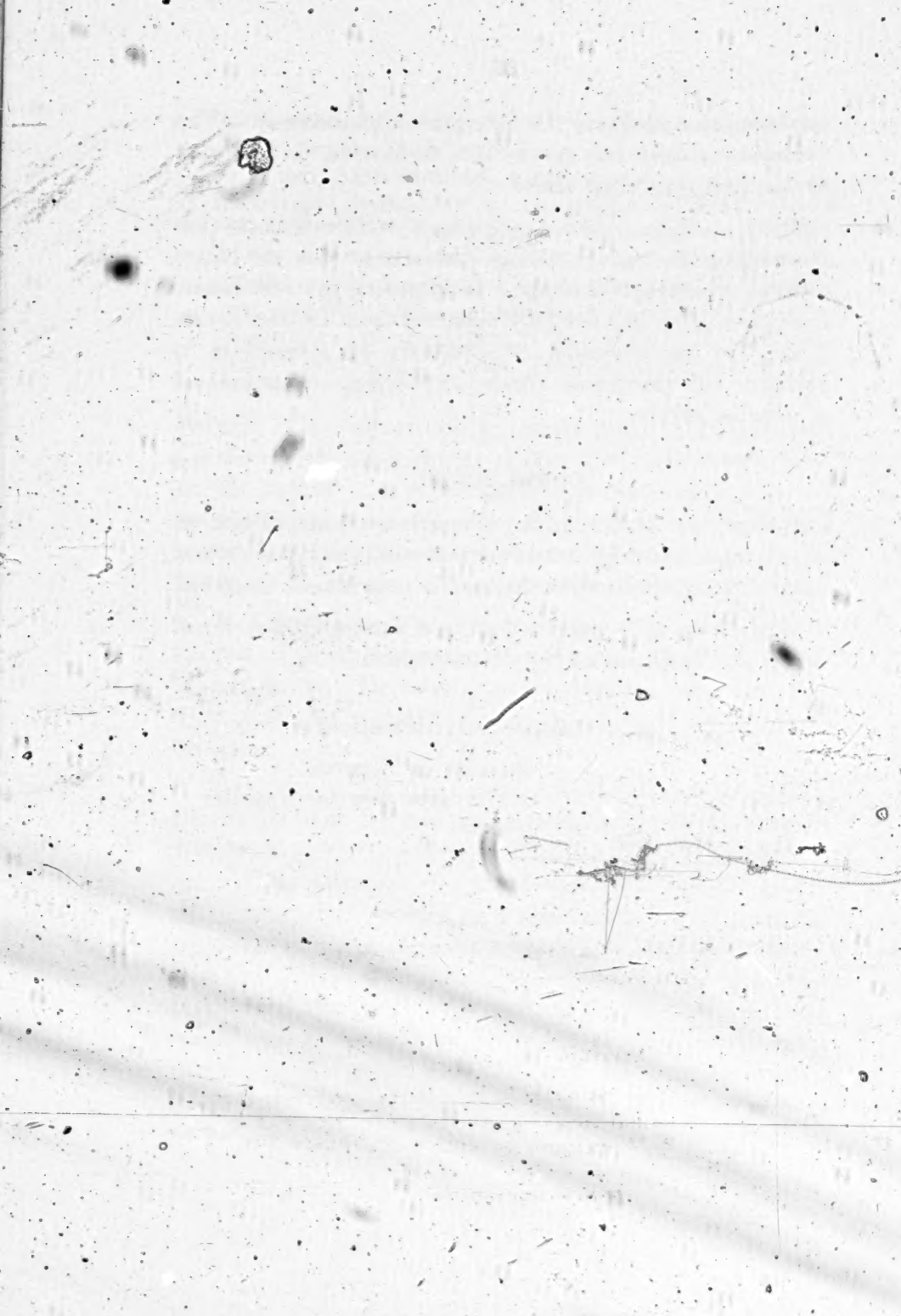
In the final analysis, the Commission's imposition of restrictions must be considered as without its statutory authority and contrary to the specific mandate of Congress.

Wherefore, it is prayed that this honorable Court will affirm the judgment of the district court.

Respectfully submitted,

CHARLES W. SINGER
Attorney for Appellee

September 30, 1963



APPENDIX

STATUTES INVOLVED

Section 5(b) of the Interstate Commerce Act (49 U.S.C. 5(b)) provides:

* * *

> If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable. . . .

Section 203(a)(14) of the Interstate Commerce Act (49 U.S.C. 303(a)(14)) provides:

> The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes . . .

Section 203(a)(15) of the Interstate Commerce Act (49 U.S.C. 303(a)(15)), as amended August 22, 1957, 71 Stat. 411, provides:

> The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period

of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

Section 204(a)(1) of the Interstate Commerce Act (49 U.S.C. 304(a)(1) provides:

It shall be the duty of the Commission—

• • •

To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment".

Section 204(a)(6) of the Interstate Commerce Act (49 U.S.C. 304(a)(6)), provides:

It shall be the duty of the Commission—

• • •

To administer, execute, and enforce all provisions of this chapter, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedures for such administration; • • •

Section 208(a) of the Interstate Commerce Act (49 U.S.C. 308(a)) provides:

Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity

may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204(a)(1) and (6).

Section 209(b) of the Interstate Commerce Act (49 U.S.C. 309(b) provides:

> . . . The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under section 304(a)(2) and (6) of this title.

Section 209(b) of the Interstate Commerce Act (49 U.S.C. 309(b)), as amended, August 22, 1957, 71 Stat. 411, provides:

> . . . The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions and limitations consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204(a) (2) and (6) . . .

Section 212(c) of the Interstate Commerce Act (49 U.S.C. 312 (c)) provides:

> The Commission shall examine each outstanding permit and may within one hundred and eighty days after the date this subsection takes effect institute a proceeding either upon its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and hearing revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on the date this subsection takes effect do not conform with the definition of a contract carrier in section 203(a)(15) as in force on and after the date this subsection takes effect; second, are those of a common carrier; and, third, are otherwise lawful. Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit.

Section 7(c) of the Transportation Act of 1958 (72 Stat. 573-574) provides:

• • •

> . . . the Interstate Commerce Commission shall without further proceeding issue a Certificate or permit, as the type of operation may warrant, authorizing such operations as a common or contract carrier by motor vehicle if application is made to said Commission as provided in Part II of the Interstate Commerce Act and within one hundred and twenty days after the date on which this section takes effect.

PROOF OF SERVICE

I, Charles W. Singer, attorney for J. B. Montgomery, Inc., appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the thirtieth day of September, 1963, I served copies of the foregoing brief for the appellee on the several parties thereto, as follows:

1. On the United States by mailing copies in duly addressed envelopes with first class postage prepaid, to the Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D.C.; Lee Loevinger, Esq., Assistant Attorney General, Department of Justice, Washington 25, D.C.; Robert B. Hummel, Esq., Attorney, Department of Justice, Washington 25, D.C.; Elliott H. Moyer, Esq., Attorney, Department of Justice, Washington 25, D.C., and Arthur J. Murphy, Jr., Esq., Attorney, Department of Justice, Washington 25, D.C.; and to Lawrence M. Henry, Esq., United States Attorney for the District of Colorado, Denver, Colorado, with air mail postage prepaid.

2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope, with first class postage prepaid, to Robert W. Giannane, Esq., its Chief Counsel, Interstate Commerce Commission, Washington 25, D.C., and Betty Jo Christian, Attorney, Interstate Commerce Commission, Washington 25, D.C.

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